RECORD
AND

Nos. 09-958, 09-1158, 10-283

IN THE
Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents*.

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS AMICI CURIAE SUPPORTING RESPONDENTS

MICHAEL D. GOTTESMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022

PAUL R.Q. WOLFSON
Counsel of Record
SHIRLEY CASSIN WOODWARD
MADHU CHUGH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Library of Congress
Law Library

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
FOUNDATION
125 Broad Street
New York, NY 10025

VICTOR VIRAMONTES
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
634 S. Spring Street
11th Floor
Los Angeles, CA 90014

JOHN PAYTON
DIRECTOR-COUNSEL
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013

JOSHUA CIVIN
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
1444 I Street, N.W.
Washington, D.C. 20005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURTS' LONGSTANDING AUTHORITY TO ENFORCE THE CONSTITUTION THROUGH DIRECT ACTIONS HAS BEEN PARTICULARLY CRITICAL FOR CIVIL RIGHTS AND CIVIL LIBERTIES 4

A. Civil Rights Claims Have Long Been Enforceable Through Direct Actions 5

B. Constitutional Claims Outside The Civil Rights Context Have Also Long Been Enforceable Through Direct Actions 11

C. The Supremacy Clause As Well May Be Enforced Through Direct Equitable Actions 14

II. PRECLUDING DIRECT RIGHTS OF ACTION UNDER THE SUPREMACY CLAUSE WOULD HAVE BROAD AND HARMFUL CONSEQUENCES FOR MAINTAINING THE SUPREMACY OF FEDERAL LAW 22

A. Minorities, Immigrants, and Low-Income Individuals Continue To Depend On Direct Actions Under The Supremacy Clause To Challenge Invalid State And Local Laws 23

TABLE OF CONTENTS—Continued

Page

B. Precluding Rights Of Action Under The Supremacy Clause Would Undermine Important Federal Interests 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. *Baltimore & Ohio Railroad Co* 114 U.S. 311 (1884) 12

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 12

Arkansas Department of Health & Human Services v. *Ahlborn*, 547 U.S. 268 (2006) 15, 16, 29

Asakura v. *City of Seattle*, 265 U.S. 332 (1924) 16

Bell v. *Hood*, 327 U.S. 678 (1946) 9

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 10

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 2, 6, 7

Bond v. *United States*, 131 S. Ct. 2355 (2011) 5, 14

Brown v. *Board of Education*, 347 U.S. 483 (1954) 7

Buquer v. *City of Indianapolis*, No. 11-cv-708, 2011 WL 2532935 (S.D. Ind. June 24, 2011) 24

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 28

Carlson v. *Green*, 446 U.S. 14 (1980) 10

Chamber of Commerce v. *Edmundson*, 594 F.3d 742 (10th Cir. 2010) 23

Chamber of Commerce v. *Whiting*, 131 S. Ct. 1968 (2011) 23

Chambers v. *Florida*, 309 U.S. 227 (1940) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Chicago Burlington & Quincy Railroad Co. v. *City of Chicago*, 166 U.S. 226 (1897) 12

Comacho v. *Texas Workforce Commission*, 408 F.3d 229 (5th Cir. 2005) 25

Correctional Services Corp. v. *Malesko*, 534 U.S. 61 (2001) 10

Crosby v. *City of Gastonia*, 635 F.3d 634 (4th Cir. 2011) 12

Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 16, 18, 20

Cuomo v. *Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) 16

Dennis v. *Higgins*, 498 U.S. 439 (1991) 12

District of Columbia v. *Carter*, 409 U.S. 418 (1973) 6

Ex Parte Young, 209 U.S. 123 (1908) 12, 13, 15

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 16

Foster v. *Love*, 522 U.S. 67 (1997) 16

Free Enterprise Fund v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010) 14

Georgia Latino Alliance for Human Rights v. *Deal*, No. 11-cv-1804, 2011 WL 2520752 (N.D. Ga. June 27, 2011) 24

Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 17

Green v. *Mansour*, 474 U.S. 64 (1985) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Guinn v. *United States*, 238 U.S. 347 (1915) 8

Hays v. *Port of Seattle*, 251 U.S. 233 (1920) 12

Haywood v. *Drown*, 129 S. Ct. 2108 (2009) 21

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 16, 20, 30

Howlett ex rel. Howlett v. *Rose*, 496 U.S. 356 (1990) 21

Kemp v. *Chicago Housing Authority*, No. 10-cv-3347, 2010 WL 2927417 (N.D. Ill. July 21, 2010) 24, 25

Lankford v. *Sherman*, 451 F.3d 496 (8th Cir. 2006) 25

League of United Latin American Citizens v. *Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) 24

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001) 16

Maine v. *Thiboutot*, 448 U.S. 1 (1980) 16

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 4, 5

McLaurin v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950) 7

Monroe v. *Pape*, 365 U.S. 167 (1961) 6

New York v. *United States*, 505 U.S. 144 (1992) 14

Osborn v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) 11, 15

Patsy v. *Board of Regents of Florida*, 457 U.S. 496 (1982) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Pharmaceutical Research & Manufacturers of America v. *Walsh*, 538 U.S. 644 (2003) 15, 16, 19, 26

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 2, 9

Printz v. *United States*, 521 U.S. 898 (1997) 14

Raich v. *Truax*, 219 F. 273 (D. Ariz. 1915) 11

Rowe v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) 16

Scott v. *Donald*, 165 U.S. 107 (1897) 12

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 16

Society of Sisters v. *Pierce*, 296 F. 928 (D. Or. 1924) 9

South Carolina v. *Baker*, 485 U.S. 505 (1988) 14

South Dakota v. *Dole*, 483 U.S. 203 (1987) 14

Terrace v. *Thompson*, 263 U.S. 197 (1923) 8, 9

Terry v. *Adams*, 345 U.S. 461 (1953) 2, 8

Testa v. *Katt*, 330 U.S. 386 (1947) 21

Toll v. *Moreno*, 458 U.S. 1 (1982) 30

Truax v. *Raich*, 239 U.S. 33 (1915) 2, 8

United States v. *City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980) 29

United States v. *Locke*, 529 U.S. 89 (2000) 16

Vicksburg Waterworks Co. v. *Mayor & Aldermen of Vicksburg*, 185 U.S. 65 (1902) 12, 21

TABLE OF AUTHORITIES—Continued

Page(s)

Villas at Parkside Partners v. *City of Farmers Branch*, 496 F. Supp. 2d 757 (N.D. Tex. 2007) 24

Villas at Parkside Partners v. *City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008) 24

Watters v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) 16

Webster v. *Doe*, 486 U.S. 592 (1988) 5

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 14

DOCKETED CASES

Complaint, *United States* v. *Alabama*, 11-cv-02746 (N.D. Ala. Aug. 1, 2011) 18

Complaint, *United States* v. *Arizona*, 10-cv-01413 (D. Ariz. July 6, 2010) 18

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const.
art. I, § 8, cl. 1 ..... 15, 22, 23, 26
art. I, § 8, cl. 3 ..... 3, 12, 13, 19, 20
art. I, § 10, cl. 1 ..... 2, 11, 12, 19
art. II, § 2, cl. 2 14
art. III 29
art. VI, cl. 2 ..... *passim*
amend. I 19
amend. V 6
amend. XI 13
amend. XIV 8, 9, 11, 12, 13, 19, 29
amend. XV 8, 19

42 U.S.C. § 1983 ..... *passim*

Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 6

OTHER AUTHORITIES

Bandes, Susan, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289 (1995) 7

Berzon, Honorable Marsha S., *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009) 7

Blackmun, Harry A., *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1 (1985) 7

TABLE OF AUTHORITIES—Continued

Page(s)

The Federalist Papers
No. 33 (Hamilton) 14
No. 78 (Hamilton) 5

Hart & Wechsler's The Federal Courts & The Federal System (Fallon, Richard H. et al. eds., 6th ed. 2009) 16

Hills, Roderick M., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201 (1999) 28

Key, Lisa E., *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283 (1996) 27

Mank, Bradford C., *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 Hous. L. Rev. 1417 (2003) 27

Perkins, Jane, *Medicaid: Past Successes and Future Challenges*, 12 Health Matrix 7 (2002) 27

Sloss, David, *Constitutional Remedies For Statutory Actions*, 89 Iowa L. Rev. 355 (2004) 16, 20, 29

Smolla, Rodney A., *Federal Civil Rights Acts* (3d ed. 2011) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Stephenson, Matthew C., *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93 (2005) 29

Wright, Charles Alan et al., *Federal Practice and Procedure* (3d ed. 2008) 13

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended civil liberties for over ninety years, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has appeared before this Court in numerous civil rights cases, both as direct counsel and as amicus curiae.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization established to assist African Americans and other people of color in securing their civil and constitutional rights. For more than six decades, LDF attorneys have represented parties and appeared as amicus curiae in litigation before the Supreme Court and other federal courts on matters of race discrimination, including through the type of direct constitutional enforcement actions at issue in this case.

The Mexican American Legal Defense and Education Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is

---

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), written consents to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in the federal courts throughout the nation, including the Supreme Court. MALDEF's mission includes a commitment to protect the rights of immigrant Latinos in the United States, and MALDEF has asserted preemption theories in federal court to further this commitment.

SUMMARY OF ARGUMENT

I. Enforcement of the Constitution is not dependent on affirmative action by the political branches of government. Rather, from this Nation's earliest times to the present, the federal courts have consistently exercised their equitable powers to compel compliance with the Constitution, without suggesting the necessity for a statutory vehicle, such as 42 U.S.C. § 1983, for such authority. Those equitable powers have been, and continue to be, particularly important for minorities, immigrants, low-income individuals, and others whom our majoritarian political processes are often unwilling or unable to protect against constitutional violations. Indeed, direct actions brought to enforce compliance with the Constitution have resulted in many of this Court's most important civil-rights and civil-liberties decisions, including *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), *Terry* v. *Adams*, 345 U.S. 461 (1953), *Truax* v. *Raich*, 239 U.S. 33 (1915), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); in none of those cases did the Court suggest that it was acting under § 1983 or another statutory vehicle. That history is consistent with the many cases in which this Court enforced other provisions of the Constitution, such as the Contracts Clause and Commerce Clause, as well as structural principles of federalism and separation of powers.

Such direct actions are also available to enforce a claim of preemption under the Supremacy Clause, *see* U.S. Cert. Amicus Br. 15-18, including where the preemption is based on a statute enacted under Congress's spending power. This Court has entertained and sustained many preemption claims in that context, recognizing the appropriateness of direct actions to vindicate the supremacy of federal law. Petitioner suggests that such direct actions should not be allowed, or drastically restricted to narrow contexts, but that rule would seriously undermine federal law. In many contexts, a direct action is the only way in which the supremacy of federal law could be established. Requiring litigants asserting a Supremacy Clause claim to wait for a state-court action would be grossly inefficient and could result in federal law being undermined by invalid state laws.

II. Direct actions remain critical to vindicate the supremacy of federal law. This is especially true for racial minorities, immigrants, and low-income individuals, who in many circumstances have difficulty obtaining access to, or support from, the federal political branches, and who often depend on a judicial remedy to prevent enforcement of state laws that conflict with federal laws. In contexts as diverse as immigration, housing, and public assistance, direct actions remain the only effective avenue to ensure the supremacy of federal law. Eliminating that avenue would seriously undermine federal law, because other avenues of enforcement of federal law—such as termination of federal funding or enforcement actions brought by the United States—are highly impractical and offer little or no hope for successful enforcement on behalf of individuals directly harmed by states' illegal conduct. Absent direct actions brought to establish the supremacy

of federal law by those most directly affected by preempted state laws, there could well be no meaningful remedy for state noncompliance with the Constitution's fundamental safeguards.

ARGUMENT

I. THE COURTS' LONGSTANDING AUTHORITY TO ENFORCE THE CONSTITUTION THROUGH DIRECT ACTIONS HAS BEEN PARTICULARLY CRITICAL FOR CIVIL RIGHTS AND CIVIL LIBERTIES

This Court has long recognized that the strictures of the Constitution may be enforced through direct actions for equitable relief, regardless whether Congress has enacted legislation specifically establishing a cause of action for such relief. So long as the court has subject-matter jurisdiction over the claim, separate legislation establishing a cause of action has never been necessary for a plaintiff to obtain forward-looking relief from unconstitutional conduct. Rather, the traditional equitable authority of the courts has always been deemed sufficient to provide such a remedy. The Court has adhered to this principle in many contexts—whether the constitutional claim was brought against federal, state, or local officials; whether the claim was brought to enforce individual constitutional rights or to enforce structural principles in the Constitution; and whether or not the claim was brought to preclude an anticipated enforcement action.

The courts' inherent equitable authority to compel compliance with the Constitution is implicit in the structure of the Constitution itself, and in the Constitution's status as the supreme law of the land. *See* Santa Rosa Br. 13-18. As the Court recognized in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), judicial review is necessary as a check against the aggrandizement of

power by the political branches. These structural principles not only protect each branch from intrusion by the others, but they also protect individuals from the abuse of governmental power. *See Bond* v. *United States*, 131 S. Ct. 2355, 2363-2364 (2011). Thus, as Chief Justice Marshall explained, "[t]he very essence of civil liberty" is "the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163. Although legislation may channel the way in which constitutional claims are entertained by the courts, the courts have long understood that the right to compel compliance with the Constitution is not contingent on the assent of the political branches. *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (stressing that a "'serious constitutional question'" would arise if the political branches attempted to preclude any judicial forum for constitutional claims by failing to make statutory allowance for such claims); *see also* Federalist No. 78 (Hamilton) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order ... to keep the latter within the limits assigned to their authority.").

A. Civil Rights Claims Have Long Been Enforceable Through Direct Actions

The ability to enforce rights directly under the Constitution has been particularly important for minorities, immigrants, low-income individuals, and other persons who have faced systemic barriers in our majoritarian political process and thus have often depended on the federal courts to secure their rights when Congress and the Executive Branch have been

unable or unwilling to do so.[2] Some of this Court's (and this country's) most significant steps toward achieving equality and liberty have resulted from plaintiffs' enforcement of their rights directly under the Constitution. And that was particularly true in the long period before this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), revived 42 U.S.C. § 1983 as a vehicle for enforcement of constitutional rights.

Many landmark civil rights decisions resulted from direct actions to enforce the Constitution. One such case, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), is a keystone of this Court's desegregation precedent. The *Bolling* plaintiffs challenged racial segregation in the public schools of the District of Columbia under the Due Process Clause of the Fifth Amendment. The Court ruled unanimously for the plaintiffs, holding that racial segregation in the District's public schools violated the Fifth Amendment. The Court nowhere suggested that the plaintiffs' ability to be heard on their due process claim depended on their being able to point to a statutory cause of action, such as § 1983.[3]

---

[2] *See Chambers* v. *Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[3] Indeed, at the time, it was an open question whether § 1983 applied to the District of Columbia. The Court did not address the question until *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), which held that § 1983 did not apply to persons acting under color of D.C. law. Congress later amended § 1983 to apply to such persons. Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284.

Desegregation in higher education was advanced through another direct constitutional action, *McLaurin* v. *Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). After the University of Oklahoma denied the plaintiff admission to graduate school on the basis of his race, McLaurin sued for injunctive relief, alleging that the state law prohibiting integrated schools deprived him of equal protection. The district court agreed. The Oklahoma legislature then amended the statute, allowing the university to admit the plaintiff but restricting him to segregated facilities. The plaintiff returned to the district court to seek injunctive relief, which the district court denied. The Supreme Court reversed, holding that the amended state law permitting segregated facilities deprived McLaurin of his right to equal protection. *Id.* at 642. The Court nowhere suggested that McLaurin's ability to bring his constitutional claim depended on a statutory cause of action.[4]

---

[4] Another landmark desegregation case, *Brown* v. *Board of Education*, 347 U.S. 483 (1954)—which also did not mention the predecessor statute to § 1983—can be seen as a direct constitutional action as well, although commentators disagree on how to characterize that case. *Compare* Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 685-686 (2009) (characterizing *Brown* as a direct constitutional action) *and* Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 355 (1995) (same), *with* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 1-2, 19 (1985) (characterizing *Brown* as a § 1983 suit) *and* Smolla, *Federal Civil Rights Acts* § 14:2, at 391-392 (3d ed. 2011) (same). Regardless, *Bolling* demonstrates that there is a direct right of action under the Constitution to challenge the legality of racial segregation in public schools.

In an equally important decision for minority voting rights, the Court in *Terry* v. *Adams*, 345 U.S. 461 (1953), sustained a constitutional challenge by black citizens to one of a series of schemes to maintain whites-only primary elections in Texas. Having abandoned their claim for damages, the *Terry* plaintiffs rested their equitable claims directly on the Fourteenth and Fifteenth Amendments. *Id.* at 478 nn.2 & 3 (Clark, J. concurring). The Court struck down the discriminatory primary as unconstitutional. *Id.* at 470; *see also id.* at 467 n.2 (plurality opinion) (noting that the Fifteenth Amendment is "'self-executing'"). In so ruling, the Court relied on its earlier decision in *Guinn* v. *United States*, 238 U.S. 347 (1915), which invalidated grandfather clauses under the Fifteenth Amendment, even though Congress had not enacted specific legislation reaching primary elections, based on "the self-executing power of the 15th Amendment," *id.* at 368.

Several of this Court's pathmarking decisions establishing the rights of noncitizens also reached the Court by way of direct action. For example, in *Truax* v. *Raich*, 239 U.S. 33 (1915), this Court held that an Arizona statute prohibiting the employment of noncitizens violated their rights to equal protection under the Fourteenth Amendment. The Court did not suggest the case was before it under a statutory cause of action such as § 1983, but rather stressed that the plaintiff had invoked the equitable power of the district court to restrain unconstitutional action. Similarly, in *Terrace* v. *Thompson*, 263 U.S. 197 (1923), the Court, although rejecting an immigrant's constitutional claim on the merits, stressed that the power to compel compliance with the Constitution rested on the courts' traditional equitable powers, noting that equity jurisdiction will be exercised to enjoin unconstitutional state laws "wherever

it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable." *Id.* at 214.

Similarly, one of this Court's leading decisions on the meaning of "liberty" within the Due Process Clause, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), arrived at the Court by way of a direct action brought to enforce the Fourteenth Amendment and to prevent Oregon officials from implementing a state compulsory education law that would have forced all children to attend public schools. *See id.* at 530. The Court nowhere referred to a statutory cause of action under which the claim for equitable relief was brought. The district court where the case was originally brought observed that "[t]he question as to equitable jurisdiction is a simple one, and it may be affirmed that, without controversy, the jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege, or immunity, threatened or active, to the detriment or injury of a complainant, *is inherent*, unless such party has a plain, speedy, and adequate remedy at law." *Society of Sisters* v. *Pierce*, 296 F. 928, 931 (D. Or. 1924) (emphasis added).

This theme—that the courts have inherent authority to restrain violations of the Constitution, so long as they have subject-matter jurisdiction—runs throughout the Court's decisions and has never been seriously questioned. In *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) (footnote omitted), the Court observed that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do"—without any mention of a statutory vehicle such as § 1983. And although Jus-

tices of this Court have debated whether *damages* should be available to remedy *past* constitutional violations in the absence of a statutory cause of action, *see Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), the Court has never questioned courts' inherent authority to enjoin threatened or ongoing constitutional violations. *See, e.g., Carlson* v. *Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) (criticizing direct constitutional actions for damages, but acknowledging tradition of direct constitutional actions for equitable relief, and noting that "[t]he broad power of federal courts to grant equitable relief for constitutional violations has long been established").

Moreover, contrary to petitioner's assertion (Pet. Br. 43-44), the Court has entertained such direct actions to enforce the Constitution regardless whether that claim was brought to prevent a threatened enforcement action and might have been raised in defense to such an action. *See infra* pp. 18-22; U.S. Cert. Amicus Br. 17-18 (acknowledging that "not all of this Court's" preemption cases involved claims raised in defense to enforcement actions). Indeed, where the plaintiff could not bring the claim defensively to an enforcement action, the case for exercise of the courts' equity power is particularly compelling because the plaintiff could well have no other way to vindicate his constitutional rights. In the desegregation and voting rights cases discussed above, for example, there was no clear way that the plaintiffs seeking to vindicate their constitutional rights could have obtained a ruling on the merits of their claims except through affirmative litigation. And in *Truax*, the district court observed that the noncitizen's constitutional claim presented an appropriate

case for the exercise of equity power because under the challenged Arizona statute only employers, not (noncitizen) employees, were subject to criminal prosecution; thus the noncitizen employee would have had no other forum for his claim to be heard. *See Raich* v. *Truax*, 219 F. 273, 283-284 (D. Ariz. 1915). If a plaintiff seeking to enforce the Constitution has no other forum in which to raise his claim, that provides a stronger—not a weaker—rationale for the courts to entertain a direct equitable action.

B. Constitutional Claims Outside The Civil Rights Context Have Also Long Been Enforceable Through Direct Actions

These civil rights cases are in keeping with historical tradition, in which this Court has long recognized direct actions to enforce constitutional provisions, regardless whether Congress has provided a specific statutory vehicle for enforcement of the Constitution.

One of the earliest examples is *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). This Court resolved the Bank of the United States' suit against the Ohio Auditor for collecting a state tax that conflicted with the federal statute that created the Bank. Although no statute created a cause of action for the Bank, this Court found that the dispute warranted the "interference of a Court," and it held the Ohio law unconstitutional on the ground that it was "repugnant to a law of the United States" and therefore void under the Supremacy Clause. *Id.* at 838, 868.

In the years after *Osborn*, and with increasing frequency after Congress provided for federal-question jurisdiction in 1875, courts routinely entertained suits to enforce directly a broad range of constitutional provisions, including the Contracts Clause, the Fourteenth

Amendment's Due Process Clause, and the dormant Commerce Clause. *See, e.g.*, *Hays* v. *Port of Seattle*, 251 U.S. 233 (1920) (Due Process Clause and Contracts Clause); *Vicksburg Waterworks Co.* v. *Mayor & Aldermen of Vicksburg*, 185 U.S. 65 (1902) (Contracts Clause); *Chicago Burlington & Quincy R.R. Co.* v. *City of Chi.*, 166 U.S. 226 (1897) (Due Process Clause); *Scott* v. *Donald*, 165 U.S. 107 (1897) (Commerce Clause); *Allen* v. *Baltimore & Ohio R.R. Co.*, 114 U.S. 311 (1884) (Contracts Clause). Particularly noteworthy are the direct actions for equitable relief brought to enforce the Contracts Clause, because it still is not settled in this Court whether claims under the Contracts Clause may be brought under § 1983. *See Dennis* v. *Higgins*, 498 U.S. 439, 456-457 (1991) (Kennedy, J., dissenting); *Crosby* v. *City of Gastonia*, 635 F.3d 634, 640-641 (4th Cir. 2011) (noting issue), *petition for cert. filed*, No. 10-1479 (U.S. June 8, 2011). Nonetheless, the Court explained in *Vicksburg Waterworks* that the Contracts Clause claim was properly before it because "the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question"—without suggesting that a statutory cause of action was also necessary. 185 U.S. at 82. The Court more recently upheld a Contracts Clause claim in such a direct-action posture in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), without discussing whether the claim might have been brought under § 1983.

One of the most notable of these cases was *Ex Parte Young*, 209 U.S. 123 (1908). After the Minnesota Attorney General signaled his intention to enforce a state law limiting the rates that railroads could charge, a group of railroad shareholders sued him to enjoin en-

forcement of that law, arguing that it violated the Commerce Clause and Due Process Clause of the Fourteenth Amendment. The Court concluded that the Eleventh Amendment does not bar suits against state officers to enjoin violations of the Constitution or federal law. *Id.* at 159-160. The Court also concluded that the federal courts had jurisdiction because the case raised "Federal questions" directly under the Constitution. *Id.* at 143-145. The Court thus viewed the Constitution—paired with the federal-question jurisdiction statute—as providing the basis of the plaintiffs' right to sue a state officer to enjoin an alleged constitutional violation. As this Court has observed, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). Indeed, scholars have concluded that "the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws."[5]

Also demonstrating this principle are the numerous cases in which this Court has resolved structural constitutional claims brought against the federal government without suggesting that a statutory cause of action was necessary for those claims to be before the courts, and where there was no evident alternative forum for those claims to be heard (such as under the

---

[5] Wright et al., *Federal Practice and Procedure* § 3566, at 292 (3d ed. 2008).

Administrative Procedure Act or in defense to an enforcement action). *See Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992); *South Carolina* v. *Baker*, 485 U.S. 505 (1988); *South Dakota* v. *Dole*, 483 U.S. 203 (1987); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *see also Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 & n.2 (2010) (ruling that Appointments Clause claim was properly before the courts, despite the absence of a statutory cause of action).[6]

C. The Supremacy Clause As Well May Be Enforced Through Direct Equitable Actions

Given the courts' historical willingness to entertain direct actions to enforce the Constitution, it would be surprising to learn that the Supremacy Clause, alone among the Constitution's provisions, could not be so enforced. As the Framers explained, the Supremacy Clause is fundamental to the Constitution, for if the laws of the United States "were not to be supreme," then "they would amount to nothing." Federalist No. 33 (Hamilton). The Supremacy Clause thus "flows immediately and necessarily from the institution of a federal government." *Id.*; *see also* Santa Rosa Br. 30-31. In keeping with historical tradition, direct actions under the Supremacy Clause have played an important

---

[6] In its most recent Term, this Court reiterated that it will entertain individuals' challenges based on federal structural constitutional principles. *See Bond*, 131 S. Ct. at 2363-2364 ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines."); *see also id.* at 2365 ("The structural principles secured by the separation of powers protect the individual as well.").

role in vindicating the supremacy of federal law, as *Osborn* and *Ex parte Young* illustrate.

This Court has implicitly recognized a right of action under the Supremacy Clause to enjoin preempted state law in many contexts—including cases where the preempting federal law was enacted pursuant to Congress's Spending Clause powers, and where state participation in the federal program was voluntary.[7] By routinely resolving such claims on the merits, without regard to whether a federal statute confers a right of action, this Court has established not only that federal courts have subject-matter jurisdiction over claims to enjoin preempted state law but that there is a right of action under the Supremacy Clause for such claims. *See* U.S. Cert. Amicus Br. 15-18 (recognizing that the Court has often decided preemption claims on their merits, implicitly assuming that a cause of action exists under the Supremacy Clause to challenge preempted state law). It is particularly noteworthy that the Court entertained such Supremacy Clause claims without ref-

---

[7] *See, e.g., Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006) (federal Medicaid law preempts state statute imposing liens on tort settlement proceeds). In *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003) *("PhRMA")*, seven Justices (four in the plurality and three in dissent) reached and resolved the merits of plaintiff's claim that the challenged state law was preempted by the federal Medicaid statute. *See id.* at 649-670 (plurality opinion) (finding on the merits that state law was not preempted); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (finding on the merits that the state law was preempted). By so doing, seven Justices implicitly concluded both that the Court had the authority to resolve the case under federal-question jurisdiction and that the plaintiff had a claim to injunctive relief under the Supremacy Clause. *See id.* at 668 (plurality opinion).

erence to a statutory cause of action long before *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), established that § 1983 may be used to vindicate federal statutory—in addition to federal constitutional—rights against state interference. *See, e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Asakura* v. *City of Seattle*, 265 U.S. 332 (1924). That tradition continues unbroken to this day.[8]

In short, "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provi-

---

[8] *See, e.g.*, *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) (regulations promulgated under National Bank Act preempt enforcement of executive subpoenas from state Attorney General); *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (Federal Aviation Administration Authorization Act preempts state requirements related to the transport of tobacco products); *Ahlborn*, 547 U.S. 268 (federal Medicaid law preempts state statute imposing liens on tort settlement proceeds); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (National Bank Act preempts state supervision of mortgage-lending activities by national bank affiliates); *PhRMA*, 538 U.S. at 649-670 (plurality opinion) (Medicaid Act did not preempt state prescription-drug rebate law); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act preempts state regulations on cigarette advertising); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000) (federal Burma statute preempts state statute barring state procurement from companies that do business with Burma); *United States* v. *Locke*, 529 U.S. 89 (2000) (various federal statutes preempt state regulations concerning, *inter alia*, the design and operation of oil tankers); *Foster* v. *Love*, 522 U.S. 67 (1997) (federal election statute preempts Louisiana's "open primary" statute); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA preempts portions of state benefits law); *see also* Sloss, *Constitutional Remedies for Statutory Actions*, 89 Iowa L. Rev. 355, 365-400 (2004) (canvassing this Court's case law on preemption claims).

sion—and that such an action falls within federal question jurisdiction—is well established." *Hart & Wechsler's The Federal Courts & The Federal System* 807 (Fallon et al. eds., 6th ed. 2009) (collecting cases).

This Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), is consistent with this analysis. That decision makes clear that § 1983 does not provide a home for all preemption claims (but may be used only to vindicate federal "rights"), *see id.* at 107, but it nowhere suggests that preemption claims may not be directly asserted merely because § 1983 does not provide a vehicle to do so. That the Supremacy Clause itself "does not create rights *enforceable under § 1983*," *id.* (emphasis added) means only that certain preemption claims may not be brought under § 1983, not that such claims may not be brought at all. Indeed, the dissent in *Golden State Transit*, which would have denied the award of money damages under § 1983, made that very point, explaining that denying relief under § 1983 "would not leave the company without a remedy" because "§ 1983 does not provide the exclusive relief that the federal courts have to offer," and that the plaintiffs could seek an injunction on preemption grounds. *Id.* at 119 (Kennedy, J., dissenting).[9]

---

[9] Section 1983 is not duplicative of the right of action for injunctive relief under the Supremacy Clause. By enacting § 1983, Congress expanded the kinds of state action that private litigants could challenge and the remedies they could seek beyond those available in suits directly under the Constitution. *See* Cal. Pharmacists Br. 35-39; Dominguez Br. 29-34; Santa Rosa Br. 27-28. That § 1983 has been an important mechanism to secure constitutional rights by providing damages remedies against state and local officials does not mean that § 1983 is the only avenue through which unconstitutional state action can be challenged.

Although petitioner and his amici have acknowledged that the federal courts have previously entertained direct actions to enforce the Constitution (including the Supremacy Clause), they have suggested that, where Congress has not provided a vehicle such as § 1983 for such claims to be entertained, then those claims should be remitted to state courts, under whatever procedures the States might have provided for them to be heard—or that, at most, the federal courts should entertain such direct actions only when they are brought to prevent the threatened imminent enforcement of an unconstitutional or preempted state law. *See* Pet. Br. 43-44; National Governors Ass'n et al. Amicus Br. 22-26; U.S. Merits Amicus Br. 19-22.[10] Those suggestions should be rejected for several reasons.

First, those arguments are inconsistent with this Court's uniform precedent. This Court has entertained and sustained many direct equitable actions under the Constitution, including the Supremacy Clause, and also including preemption claims based on a federal spending statute, even when there was no evident enforcement action to which the federal claim might be raised as a defense. For example, in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), the challenged

---

[10] The United States has taken the position elsewhere that the Supremacy Clause provides a direct cause of action that is not limited to asserting a defense to a state enforcement action. *See* Compl., *United States* v. *Arizona*, 10-cv-01413 (D. Ariz. July 6, 2010) (filed by the United States as plaintiff challenging Arizona immigration law, seeking declaratory and injunctive relief and asserting "Violation of the Supremacy Clause" as its first cause of action); Compl., *United States* v. *Alabama*, 11-cv-02746 (N.D. Ala. Aug. 1, 2011) (similar, in challenge to Alabama law).

Massachusetts law barred government procurement of goods and services from companies doing business with Burma. *See id.* at 366-367. There was no "enforcement" action in which the companies could raise preemption as a defense; the plaintiffs simply could no longer get government contracts. This Court held that the state law was preempted, necessarily presuming that there was a right of action under the Supremacy Clause that could be asserted directly and not merely in defense of an enforcement action. *Id.* at 367; *see also PhRMA*, 538 U.S. at 649-670 (plurality opinion); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (seven Justices resolving Medicaid-based preemption claim on the merits where that claim was raised affirmatively and not in defense to an enforcement action); *supra* pp. 10-11 (noting other examples of direct constitutional claims being entertained where they could not have been raised as defenses to enforcement actions).

Second, a rule requiring preemption claims to be advanced defensively only, while allowing claims based on a violation of constitutional *rights* to go forward in federal court under § 1983, would be extraordinarily inefficient and would undermine the effective vindication of federal law. Litigants frequently pursue both preemption theories and other constitutional claims. This Court's cases teem with examples: businesses commonly pursue both preemption claims and claims under the Commerce, Contracts, or Due Process Clauses; immigrants pursue both preemption claims and claims under the Equal Protection Clause and First Amendment; racial minorities pursue both statutory claims and claims under the Fourteenth and Fifteenth Amendments. Very often, courts turn to the preemption claim first in order to avoid reaching difficult con-

stitutional questions. *See, e.g., Crosby*, 530 U.S. 363 (holding state procurement statute preempted by federal Burma statute, and thereby avoiding dormant Foreign Commerce Clause claim); *Hines*, 312 U.S. 52 (holding Pennsylvania registration law for noncitizens preempted by federal legislation enacted while the case was before the Supreme Court, and thus avoiding equal protection claim).

If litigants could not pursue both preemption claims (directly) and other constitutional claims (under § 1983) in a single action for equitable relief, but were required to pursue preemption theories not cognizable under § 1983 only in state court, then they would be forced either to divide their federal claims between federal and state courts—which could well be barred by rules against splitting causes of action—or to forgo the federal forum for their § 1983 claims—which would be contrary to the strong congressional policy in favor of affording a federal forum for such claims. *See, e.g., Patsy* v. *Board of Regents of Fla.*, 457 U.S. 496 (1982). The far more efficient and sensible rule, as well as the one more consistent with this Court's decisions, is to allow equitable claims based on all provisions of the Constitution, including the Supremacy Clause, to be entertained in affirmative litigation through an action directly under the Constitution.

In addition, the rule proposed by petitioner and its amici would not adequately assure the supremacy of federal law. Many Supremacy Clause claims cannot be raised defensively at all, because there is no enforcement action in which they can be raised; in such circumstances, an affirmative direct action under the Constitution is the only way in which the supremacy of federal law could be established. *See* Sloss, *Constitutional Remedies for Statutory Actions*, 89 Iowa L. Rev. 355,

406 (2004) (discussing such claims). And even when a litigant might be able to assert his federal claim in defense of state enforcement actions or in defense to state common law claims, his ability to establish the supremacy of federal law should not be dependent on the venues that state law has happened to make available.[11] Indeed, this Court has long recognized that "it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury." *Vicksburg Waterworks*, 185 U.S. at 82.

The history of the civil rights movement in this country well illustrates the need to enforce federal rights in the federal courts, without reliance on legislative grace or the vagaries of state law. Had § 1983 never been enacted, it could hardly be the case that state laws providing for segregated schools, white primaries, and restrictions on immigrants could have gone unchallenged. Plaintiffs could challenge, and did challenge, such unconstitutional state laws directly under the Supremacy Clause. And nothing in the Supremacy Clause suggests that it may not also be used directly to challenge state laws because they conflict with a federal law, and not (or not just) the federal Constitution. The Supremacy Clause itself provides that both the Constitution "*and* the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." U.S. Const. art. VI (emphasis added).

---

[11] *Cf. Haywood* v. *Drown*, 129 S. Ct. 2108 (2009) (state courts cannot refuse to entertain certain classes of federal claims); *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356 (1990) (state court cannot apply state sovereign-immunity principles to refuse adjudication of federal law claim); *Testa* v. *Katt*, 330 U.S. 386 (1947) (state courts cannot discriminate against federal claims).

Finally, nothing in the Supremacy Clause or this Court's precedent indicates that statutes enacted pursuant to Congress's Spending Clause power should be treated any differently than statutes enacted pursuant to other sources of congressional power, *i.e.*, that direct causes of action may not be brought to vindicate the federal structural interest in the supremacy of Spending Clause statutes. Indeed, numerous Spending Clause statutes—including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act—are critical in preventing discrimination and protecting civil liberties, and many others—such as Medicaid and the Supplemental Nutrition Assistance Program (previously called the Food Stamp Program)—provide a critical safety net on which low-income individuals rely for survival.

II. Precluding Direct Rights Of Action Under The Supremacy Clause Would Have Broad And Harmful Consequences For Maintaining The Supremacy Of Federal Law

An action under the Supremacy Clause provides an important—and sometimes the only—avenue to vindicate the supremacy of federal law. Barring a right of action under the Supremacy Clause could effectively foreclose this critical avenue for persons, especially minorities, immigrants, and low-income individuals, who depend on federal law and who would otherwise be subject to invalid state and local laws.

A. Minorities, Immigrants, And Low-Income Individuals Continue To Depend On Direct Actions Under The Supremacy Clause To Challenge Invalid State And Local Laws

Racial minorities, immigrants, and low-income individuals continue to rely directly on the Supremacy Clause to challenge invalid state and local laws in many important areas, including immigration, fair housing, public assistance, and health care. Many of those cases have involved legislation enacted under Congress's Spending Clause power, and the courts have routinely adjudicated and sometimes invalidated state laws that conflicted with the federal legislation.

For example, several plaintiffs in recent years have used the Supremacy Clause to challenge the increasing number of state laws that seek to restrict immigrants' rights, including immigrants' employment opportunities. In *Chamber of Commerce* v. *Edmondson*, 594 F.3d 742 (10th Cir. 2010), plaintiffs claimed that provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007, which created new employee verification rules and imposed sanctions on employers that allegedly hire undocumented immigrants, conflicted with federal immigration law, which sets forth a comprehensive scheme prohibiting the employment of such individuals. The Tenth Circuit, which upheld in part a preliminary injunction against enforcement of the state law, explained that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.* at 756 n.13 (internal quotation marks omitted); *see also Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968 (2011) (adjudicating preemption challenge to Arizona law providing for the revocation or suspension of licenses in certain circumstances

of state employers who knowingly hire undocumented immigrants, but finding no preemption).

Numerous other courts similarly have addressed preemption challenges, under the Supremacy Clause, to state and local laws that affect immigrants' access to housing and other vital services. *See Georgia Latino Alliance for Human Rights* v. *Deal*, No. 11-cv-1804, 2011 WL 2520752, at *6 (N.D. Ga. June 27, 2011) (finding independent jurisdictional grounds under the Supremacy Clause to allow a preemption challenge against Georgia's Illegal Immigration and Enforcement Act of 2011 and entering preliminary injunction); *Buquer* v. *City of Indianapolis*, No. 11-cv-708, 2011 WL 2532935, at *2 (S.D. Ind. June 24, 2011) (considering a Supremacy Clause challenge to an Indiana law that allows, *inter alia*, law enforcement officers to make a warrantless arrest of an immigrant under certain conditions and entering preliminary injunction); *Villas at Parkside Partners* v. *City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007) (considering a Supremacy Clause challenge to city ordinance that essentially "created its own classification scheme for determining which noncitizens may rent an apartment" in the city and entering preliminary injunction), *permanent injunction entered*, 577 F. Supp. 2d 858, 879 (2008); *League of United Latin Am. Citizens* v. *Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (finding preempted most provisions of a state law that, *inter alia*, restricted immigrants' access to health care, social services, and education).

Low-income individuals have likewise invoked the Supremacy Clause to ensure compliance with federal housing laws. In *Kemp* v. *Chicago Housing Authority*, No. 10-cv-3347, 2010 WL 2927417 (N.D. Ill. July 21, 2010), a single mother of two argued that municipal

rules unlawfully allowed the Chicago Housing Authority to terminate her public housing assistance in circumstances other than those specified and limited by the United States Housing Act of 1937. Kemp sought to enjoin the local law as preempted under the Supremacy Clause. Although the court ultimately did not grant relief because of the Anti-Injunction Act, it concluded that the Supremacy Clause "create[s] rights enforceable in equity proceedings in federal court," and that it could therefore exercise jurisdiction over Kemp's preemption claim. *Id.* at *3 (internal quotation marks omitted).

Persons receiving public assistance have also invoked the Supremacy Clause to challenge state laws that terminate medical or other benefits in contravention of federal law. For example, in *Comacho* v. *Texas Workforce Commission*, 408 F.3d 229 (5th Cir. 2005), the court invalidated under the Supremacy Clause state regulations that expanded the circumstances, beyond those allowed by federal law, under which Medicaid benefits could be cut off for low-income adults receiving assistance under the federal Temporary Assistance to Needy Families program.

Finally, the Eighth Circuit in *Lankford* v. *Sherman*, 451 F.3d 496 (8th Cir. 2006), relied directly on the Supremacy Clause to preliminarily enjoin a Missouri regulation that limited Medicaid coverage of durable medical equipment to certain populations, making most Medicaid recipients in Missouri ineligible to receive such items even if medically necessary. *Id.* at 509. The court found that the regulation conflicted with Medicaid's requirements and goals and therefore was likely preempted under the Supremacy Clause. *Id.* at 513 (holding that plaintiffs had "established a likelihood

of success on the merits of their preemption claim" for obtaining a preliminary injunction).

The Supremacy Clause right of action therefore remains critically important to minorities, immigrants, and low-income persons in our society who rely on it for vindication of federal law. The availability of that direct action ensures that state and local governments cannot undermine federal law by enacting statutes and regulations that deviate from federal requirements but would, absent a Supremacy Clause action, be effectively insulated from judicial review.

B. Precluding Rights Of Action Under The Supremacy Clause Would Undermine Important Federal Interests

Precluding a right of action under the Supremacy Clause would leave important rights and interests effectively unprotected. Not only will the rights of individual litigants seeking to invalidate unconstitutional state laws be harmed, but important federal supremacy interests could go unprotected as well.

First, precluding rights of action under the Supremacy Clause would leave few, if any, effective remedies to force state compliance with many federal laws that are intended to benefit minorities, immigrants, and low-income persons in our society. In the context of laws enacted under Congress's Spending Clause power, the termination of federal funding may sometimes be theoretically available to remedy the State's failure to comply with its obligations under the Medicaid Act or other Spending Clause laws, *see PhRMA*, 538 U.S. at 675 (Scalia, J., concurring in the judgment), but that remedy is so rare and drastic as to be effectively unavailable as a meaningful enforcement tool. As commentators have explained, both political considerations

and procedural hurdles make withdrawal of federal funding an illusory remedy. *See, e.g.*, Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 Hous. L. Rev. 1417, 1431-1432 (2003) ("[A]s a practical matter, federal agencies rarely invoke the draconian remedy of terminating funding to a state found to have violated the [federal] conditions because there are often lengthy procedural hurdles that allow a state to challenge any proposed termination of funding, and members of Congress from that state will usually oppose termination of funding."); Perkins, *Medicaid: Past Successes and Future Challenges*, 12 Health Matrix 7, 32 (2002) ("[T]he Medicaid Act provides for the Federal Medicaid oversight agency to withdraw federal funding if a State is not complying with the approved State Medicaid plan; however, ... this is a harsh remedy that has rarely, if ever, been followed through to its conclusion."); Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 292-293 (1996) ("[O]ften the agency's only enforcement mechanism is a cutoff of federal funds for the program[,] ... [which] is rarely, if ever, invoked.").[12]

Moreover, termination of federal funding would in many circumstances be counterproductive and contrary to Congress's intent that the funding program be implemented to provide a wide benefit. Indeed, persons

---

[12] As respondents point out (Cal. Pharmacists Br. 2-3, 17), this case shows how difficult it can be for the Executive Branch to enforce the supremacy of federal law by itself; even after the responsible federal agency disapproved state rate cuts as inconsistent with federal law, the State continued to implement its invalid legislation.

who receive crucial benefits and services from federal programs usually do not want federal funding to be terminated. Terminating federal funding would not protect the interests of those injured by the State's noncompliance with federal law; rather, it would harm the very people Congress intended to benefit. *See Cannon* v. *University of Chi.*, 441 U.S. 677, 704-705 (1979) (explaining that "termination of federal financial support for institutions engaged in discriminatory practices ... is ... severe" and "may not provide an appropriate means of accomplishing" the purposes of the statute); *see also* Hills, *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1227-1228 (1999) ("[T]he sanction of withdrawing federal funds from noncomplying state or local officials is usually too drastic for the federal government to use with any frequency: withdrawal of funds will injure the very clients that the federal government wishes to serve.").

The more effective way to vindicate the objectives of federal law is to allow for the important role that private parties play in enforcing the supremacy of federal statutes. As the United States previously argued in this case, "those programs in which the drastic measure of withholding all or a major portion of federal funding is the only available remedy would be generally less effective than a system that also permits awards of injunctive relief in private actions in appropriate circumstances." *See* U.S. Cert. Amicus Br. 19. In such circumstances, an injunction would force a State to comply with the federal provision at issue without harming the intended beneficiaries of the federal program.

Nor would it be appropriate to force individuals who depend on federal law to rely exclusively on the federal government to bring affirmative litigation to enforce compliance with the Supremacy Clause. Private rights of action are necessary because the government lacks the resources to police preemption disputes between States and private parties. *See* Sloss, *Constitutional Remedies For Statutory Actions*, 89 Iowa L. Rev. at 404. Private rights of action "increase the social resources devoted to law enforcement, thus complementing government enforcement efforts." Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 108 (2005); *see also Ahlborn*, 547 U.S. at 291. In short, absent a right of action under the Supremacy Clause there could well be no meaningful remedy at all for state noncompliance.[13]

A private right of action under the Supremacy Clause serves other important values as well. The Supremacy Clause supports the structural guarantee of

---

[13] Indeed, it is not entirely clear that the federal government would always be authorized to sue to compel enforcement of federal law. Private plaintiffs directly affected by state laws have Article III standing to sue to enjoin their enforcement; the federal government might not. And if private plaintiffs did not have a direct right of action to sue under the Supremacy Clause, it might well be questioned whether the United States could sue without its own statutory cause of action. *Cf. United States* v. *City of Phila.*, 644 F.2d 187 (3d Cir. 1980) (holding that United States may not sue local governments for injunction against violation of Fourteenth Amendment, absent statutory authority to sue). The Court need not resolve those issues in this case, but at a minimum there would be no assurance that enforcement by the United States would necessarily be available if private lawsuits were not permitted.

federalism—namely, that federal law will remain paramount. And that interest can only be effectively vindicated by ensuring that preempted state laws are invalidated—a goal that, for the reasons described above, can best be achieved through a private right of action. In addition, a private right of action, by allowing robust enforcement for preemption claims, fosters uniformity and predictability in the application of both federal and state law.[14] Thus, in order to realize the Constitution's fundamental promise that federal law will remain paramount over invalid state and local laws, it is essential that this Court continue—as it has done for nearly two hundred years—to allow litigants to bring preemption challenges directly under the Supremacy Clause.

CONCLUSION

The judgments of the court of appeals should be affirmed.

---

[14] Preemption claims in immigration and other areas of law have also been critical to preserving the federal government's paramount role in foreign policy. *See, e.g.*, *Hines*, 312 U.S. at 63 ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *id.* at 66-67; *Toll* v. *Moreno*, 458 U.S. 1, 10-13 (1982).

Respectfully submitted.

MICHAEL D. GOTTESMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
FOUNDATION
125 Broad Street
New York, N.Y. 10025

VICTOR VIRAMONTES
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
634 S. Spring Street
11th Floor
Los Angeles, CA 90014

PAUL R.Q. WOLFSON
Counsel of Record
SHIRLEY CASSIN WOODWARD
MADHU CHUGH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

JOHN PAYTON
DIRECTOR-COUNSEL
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, N.Y. 10013

JOSHUA CIVIN
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
1444 I Street, N.W.
Washington, D.C. 20005

AUGUST 2011